

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

THE KROGER CO.,	:	Case No.: C-1-02-439
	:	
Plaintiff,	:	Beckwith, J.
	:	Sherman, M.J.
	:	
v.	:	<u>MOTION TO DEPOSIT FUNDS IN</u>
	:	<u>DISPUTE WITH THE REGISTRY OF THE</u>
	:	<u>COURT</u>
MALEASE FOODS CORP.,	:	
	:	
Defendant.	:	

Pursuant to the Federal Rules of Civil Procedure and Local Rule 77.2, Plaintiff The Kroger Co. (“Kroger”) moves this Court to accept and escrow a payment of \$50,000.00 that is currently under dispute in the above action. This payment is related to the pending action between Kroger and Defendant Malease Foods Corp. (“Malease”). Kroger further moves this Court to accept and escrow any similar future payments that may arguably be due Malease that may arise and be in dispute during this case.

This action concerns the ownership of three industrial facilities—one each in Kentucky, Tennessee and Texas. Without reciting all of documents and transactions more particularly described in the Complaint and the subsequent pleadings in this action, since July 24, 2001, Kroger has owned fee title to the facilities, which in turn have been leased to Malease and subleased back to Kroger. Under the terms of the underlying agreements, all rents accrue in arrears and are paid semi-annually on April 1 and October 1 of each year. The net amount due Malease (the excess between the rents due from Kroger to Malease under the three Lease Agreements dated April 1, 1983 and the rents due from Malease to Kroger under the single

Lease Agreement dated June 1, 1983) for the period April 1, 2003 through September 30, 2003 would be \$50,000.00.

Kroger disputes that Malease is entitled to the \$50,000.00. Had Malease performed its obligations under the three Lease Agreements dated April 1, 1983, Kroger would have owned Malease's interests in the properties on April 1, 2003 and any monies due under the Lease Agreements dated April 1, 1983 would have been the sole property of Kroger. What's more, Malease's breach of its obligations has damaged Kroger in excess of \$50,000.00. Nevertheless, to forestall any claims by Malease that Kroger has failed to meet its rental obligations under the three Lease Agreements dated April 1, 1983, Kroger moves the Court to accept and escrow the aforementioned \$50,000.00 and all future "net amounts" that may arise while this action is still pending and to award these amounts to Kroger as monies that would have otherwise been paid to Kroger had Malease not breached its obligations under the three Lease Agreements dated April 1, 1983.

Courts must provide compensating protection of a reasonable secured bond, escrow deposit, or other mechanism when monies or property is in dispute. *See, e.g., General Box Company v. Rockaway Corp.*, 772 F.2d 906 (6th Cir. 1985), *citing Washington Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472, 476 (9th Cir. 1969), *citing Tanner Motor Livery, Ltd. v. Avis, Inc.*, 316 F.2d 804, 808-809 (9th Cir. 1963), *cert. denied*, 375 U.S. 821 (1963).

While this Motion is pending, the funds have been placed in a private escrow account with a reputable bank. Kroger deposited \$50,000 in KEMBA Credit Union, Cincinnati, Ohio in an account entitled "The Kroger Co. – Malease DK5 Lease Escrow," account number 0000723900.

This escrow amount is in dispute and should not be paid to Malease unless they prevail in this action.

Respectfully submitted,

/s/ Douglas R. Dennis

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2003, a copy of the foregoing was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system and copies will be mailed via U.S. mail to those parties who are not served via the Court's electronic filing system. Parties may access this filing through the Court's system.

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